ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MM Docket No. 98-35

AFFIDAVIT OF J. GREGORY SIDAK

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J. Gregory Sidak, being duly sworn, deposes and says:

QUALIFICATIONS

1. My name is J. Gregory Sidak. I am the F. K. Weyerhaeuser Fellow in Law and Economics at the American Enterprise Institute for Public Policy Research (AEI) in Washington, D.C., where I direct AEI's Studies in Telecommunications Deregulation. I am also a senior lecturer at the Yale School of Management, where I teach a course on telecommunications regulation and strategy with Professor Paul W. MacAvoy. In addition to holding those two academic positions, I am a Principal in LECG, Inc., an economic consulting services firm that provides economic and financial analysis, expert testimony, litigation support, and strategic management consulting to a broad range of public and private enterprises.

2. I have worked in the federal government on three occasions. From 1987 to 1989, I served as Deputy General Counsel of the Federal Communications Commission (FCC). From 1986 to 1987, I served as Senior Counsel and Economist to the Council of Economic Advisers in the Executive Office of the President. From 1981 to 1982, I served as a law clerk to Chief Judge Richard A. Posner during his first term on the U.S. Court of Appeals for the Seventh

Circuit. In addition to having worked in government, I have previously worked, as an attorney in private practice, on numerous antitrust cases and federal administrative, legislative, and appellate matters concerning broadcasting, telecommunications, and other regulated industries.

3. My academic research concerns regulation and strategy in broadcasting, telecommunications, and other network industries; antitrust policy; and constitutional law issues concerning economic regulation. I have written five books concerning pricing, costing, competition, and investment in regulated network industries: *Foreign Investment in American Telecommunications* (University of Chicago Press 1997); *Deregulatory Takings and the Regulatory Contract: The Competitive Transformation of Network Industries in the United States* (Cambridge University Press 1997), co-authored with Daniel F. Spulber; *Toward Competition in Local Telephony* (MIT Press & AEI Press 1994), co-authored with William J. Baumol; *Transmission Pricing and Stranded Costs in the Electric Power Industry* (AEI Press 1995), also co-authored with Professor Baumol; and *Protecting Competition from the Postal Monopoly* (AEI Press 1996), also co-authored with Professor Spulber. I am also the author of more than thirty scholarly articles in the *California Law Review*, *Columbia Law Review*, *Cornell Law Review*, *Duke Law Journal*, *Georgetown Law Journal*, *Harvard Journal on Law & Public Policy*, *Industrial and Corporate Change*, *Journal of Political Economy*, *New York University Law Review*, *Northwestern University Law Review*, *Southern California Law Review*, *Stanford Law Review*, *Yale Journal on Regulation*, and elsewhere. I am also the editor of a forthcoming book, *Is the Telecommunications Act of 1996 Broken? (If So, How Can We Fix It?)* (AEI Press 1998). I have testified before the U.S. Senate and House of Representatives, and my writings have been cited by the Supreme Court of the United States, by the lower federal and state supreme courts,

and by state and federal regulatory commissions.

4. I have been a consultant on regulatory and antitrust matters to the Antitrust Division of the U.S. Department of Justice, to the Canadian Competition Bureau, and to more than thirty companies in the broadcasting, telecommunications, electric power, natural gas, mail delivery, and computer software industries in North America, Europe, Asia, and Australia.

5. From Stanford University I earned A.B. and A.M. degrees in economics and a J.D. in law. I was a member of the *Stanford Law Review*.

6. I file this affidavit in my individual capacity, and not on behalf of the American Enterprise Institute or the Yale School of Management.

EXECUTIVE SUMMARY

7. The Newspaper Association of America (NAA) has asked me to comment on whether economic analysis supports the Commission's abolition of its daily newspaper-broadcast cross-ownership rule, which prohibits the common ownership of a broadcast station and a daily newspaper in the same locale.[1] My focus specifically is on the newspaper-television cross-ownership rule, which forbids the grant of a television license to a party who directly or indirectly owns, operates, or controls a daily newspaper if the Grade A contour of the television station in question, a measure of signal field strength, encompasses the entire community in which the newspaper is published.[2] I conclude that economic analysis provides a powerful basis for determining that the abolition of the newspaper-television cross-ownership rule would serve the public interest. Economic analysis shows that the newspaper-television cross-ownership rule

1. 47 C.F.R. § 73.3555(d) (1998).
2. *Id.* § 73.3555(d)(3).

is not needed to preserve "diversity" or protect competition.

8. In 1975, the Commission articulated two possible purposes for the newspaper-television cross-ownership rule: the promotion of "diversity of viewpoints" and the promotion of "economic competition."[3] Part I of this affidavit observes that both goals have been irreversibly achieved. The Sherman Act and the Clayton Act will suffice to preserve the robust levels of "diversity of viewpoints" and "economic competition" that exist today. It is therefore unnecessary for the Commission to retain an industry-specific prophylactic rule. Stated differently, the FCC may safely analyze a potential merger between a daily newspaper and a television station the same way that the Antitrust Division or the Federal Trade Commission would analyze any other kind of merger in the mass media.

9. The Commission's justification for the newspaper-television cross-ownership rule has been that the electromagnetic spectrum is a scarce resource, and that the attainment of diversity and competition in broadcasting necessitates, paradoxically, the Commission's imposition of airtight regulatory barriers to entry. Part II of this affidavit shows that spectrum scarcity cannot logically justify retaining the newspaper-television cross-ownership rule.

10. On occasion, some in the Commission have offered two additional justifications for the agency's perpetuation of regulations on broadcasters that would not survive scrutiny under the First Amendment if imposed on the print media. Recently, two commissioners have cited those additional arguments as grounds for preserving certain broadcast content regulations that are remnants from an era when the FCC enforced the Fairness Doctrine. The first of those

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3. Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 F.C.C.2d 1046, 1074 ¶ 99 (1975); *see also* Tribune Co. *v.* FCC, 133 F.3d 61, 64 (D.C. Cir. 1998).

additional rationales is that the effect of the broadcast media is "pervasive." The second rationale is that the spectrum is public property and that, therefore, the FCC may impose conditions on the use of government property. Part III of this affidavit shows that "pervasiveness" cannot justify retaining the newspaper-television cross-ownership rule. "Pervasiveness" is in essence an argument that government may regulate more intrusively speech that is especially communicative. Part IV shows that public ownership of the spectrum cannot justify retaining the newspaper-television cross-ownership rule either.

11. In short, spectrum scarcity, "pervasiveness," and public ownership are each a normative justification offered for the newspaper-television cross-ownership rule, but none can satisfactorily explain why the rule exists—and *persists* in the face of so much evident diversity of viewpoints and economic competition. As the Supreme Court long ago established, government regulation that is ostensibly content-neutral on its face may nonetheless be enforced in a manner that unconstitutionally infringes freedom of speech.[4] The ingenuity of the modern regulatory state requires that the First Amendment bring to bear a healthy skepticism on the assertions of communications regulators that their policies are content-neutral. One must therefore ask whether the newspaper-television cross-ownership rule persists in the face of manifest diversity and competition because it is an effective means to achieve an unstated goal that differs entirely from the prevention of monopoly in the marketplace of ideas and the marketplace for advertising. If the FCC cannot cogently say, after twenty-three years, what good the newspaper-television cross-ownership rule serves in a market that is already highly diverse

4. Grosjean *v.* American Press Co., 297 U.S. 233 (1936).

and highly competitive, then one must ask what *bad* the rule might serve.[5]

12. Part V uses economic analysis of law to identify one unstated goal that is advanced by the newspaper-television cross-ownership rule. By constraining a broadcaster's ability to achieve economies of scope with respect to newspaper publishing, the newspaper-television cross-ownership rule increases the degree of asset specificity of the investments made by the broadcaster. The extent of rent extraction to which the broadcaster is vulnerable is an increasing function of the degree of asset specificity of his investment in the licensed television station. One manifestation of rent extraction imposed on a broadcaster can be content control or censorship, as in the case of incrementally unremunerative programming that the FCC compels the broadcaster to air or incrementally profitable programming that the FCC deters the broadcaster from airing. The broadcaster's ability to resist the FCC's attempt at content control, which the agency ultimately expresses through the threat of denying renewal of the broadcaster's television license, is reduced if the FCC can block the broadcaster's ability to reduce the degree of asset specificity (and hence the cost of mandatory exit from the market) by achieving economies of scope with newspaper publishing in the same locale. The FCC's threat of denial of renewal need not be frequently employed for the strategy of rent extraction to be successful. The newspaper-television cross-ownership rule limits the broadcaster's ability to reduce the extent of his investment that is held hostage to such threats of rent extraction by the FCC. In that respect, the newspaper-television cross-ownership rule—despite being ostensibly "structural" regulation of the broadcasting industry—is antithetical to a free press.

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5. *Cf.* Bechtel *v.* FCC, 957 F.2d 873, 881 (D.C. Cir. 1992) ("The Commission's necessarily wide latitude to make policy based upon predictive judgments deriving from its general expertise implies a correlative duty to evaluate its policies over time.").

I. A Remedy in Search of a Harm

13. The FCC contends that the newspaper-television cross-ownership rule seeks to ensure "diversity of viewpoints" and "economic competition." The rule thus presumes that diversity and competition are lacking. The facts in 1998 surely do not support such a presumption, however. Today, the rule thus seeks to remedy a nonexistent harm.

14. As documented in detail in Part VI of NAA's comments to the Commission in this proceeding, there is today a phenomenal range of information outlets available to consumers in a media marketplace that is more abundant, diverse, and fiercely competitive than the Commission ever could have imagined in 1975. To start, publishing sources for news and information have flourished. Weekly, specialized, and "alternative newsweekly" newspapers, which typically provide readers with highly localized content, have gained tremendous ground without harming overall daily newspaper circulation. Next, the Internet, in just a few years, has revolutionized mass communication in a way unthinkable when the newspaper-television cross-ownership rule was first adopted. Approximately sixty-two million Americans use the Internet—slightly more than the number that subscribe to daily newspapers. In addition to having a global reach, the Internet has emerged overnight as a powerful force in shaping national and even local political debate. In Washington, D.C., for example, America Online offers a "Digital City" feature with current information about local events, as well as a link to the online version of the latest-breaking local news from radio station WTOP. Voters use the Internet to learn about candidates, or to distribute campaign materials, or to organize platforms focusing on issues of community interest. Moreover, through the Internet, anyone with an opinion can become a publisher and can easily afford to communicate with a mass audience.

15. The market for audio programming, too, has undergone dramatic changes over the past two decades. Today, virtually every U.S. market has at least ten radio stations (or many more), due in large part to the rapid increase in the number of licensed stations. Beyond numbers, format diversity has yielded a rich selection of content choices for listeners—especially with the emergence as news/talk radio as a dominant force in the modern radio marketplace. In addition, many cable systems offer multiple channels of commercial-free, CD-quality audio choices, and satellite-delivered digital audio programming will soon provide yet another audio option for listeners. Further, in just two years, audio has become a mainstay of Internet content. As a result, there are already well over 100 Internet-only radio stations, and hundreds of thousands of hours of free audio programming available each week.

16. With respect to video programming, the 1990s have seen the decline of the once all-powerful "big three" television networks. Today, the top three networks face competition from three new networks—Fox (so successful that it is now considered a "major" network), UPN, and WB. A fourth new network, PaxNet, is also on the way. Moreover, cable television is now available nearly everywhere, and two-thirds of Americans subscribe (more than half of cable subscribers have access to fifty-four channels or more). Cable viewership also is on the rise. In early July, 1998, for the first time ever, the basic cable line-up attracted more viewers than the top four broadcast networks combined.

17. The recently introduced DBS service, which did not exist in any form in the 1970s, already provides hundreds of channels of programming to 6.6 million households. Other new technologies, such as SMATV, larger home satellite dishes, and wireless cable, have gained a significant foothold in the highly competitive video programming distribution market. Soon,

digital broadcast television will create a host of new outlets for over-the-air video programming, along with a variety of other digital data services. The Internet is also being actively developed as a viable alternative mechanism for the delivery of video programming.

18. Given the wealth of consumer choice for news, information, and entertainment, no persuasive factual case can be made that the newspaper-television cross-ownership rule is necessary today to ensure "diversity of expression." Whether one defines diversity as the notion that listeners and viewers have the daily opportunity to receive a variety of intellectual and cultural information, or simply as the notion that there is diverse ownership of media companies and diverse control of FCC broadcast licenses, there can be no serious dispute that the United States has a vastly more diverse media market in 1998 than it did in 1975. Whatever has caused that phenomenal growth in diversity, the central lesson for this proceeding is that the war has been won and the newspaper-television cross-ownership rule can be decommissioned from the arsenal.

19. While we celebrate the victory of diversity of viewpoints since 1975, we must be mindful that the FCC's continued pursuit of such diversity is not free of cost. A menu of programming approved by the government as "diverse" is not the same as freedom of speech. If "Congress shall make no law . . . abridging the freedom of speech, or of the press,"[6] the federal government must approach with the greatest trepidation the task of trying to judge whether electronic and print speech are sufficiently diverse. Twenty years ago, the Supreme Court upheld the constitutionality of the newspaper-television cross-ownership rule in *FCC* v.

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6. U.S. CONST. amend. I.

National Citizens Committee for Broadcasting.[7] Nonetheless, given the profound changes that now manifest themselves in the diverse, information-rich America of 1998, it would be a formidable abridgment of speech for the Commission today to confer or withhold a person's opportunity to engage in broadcast speech depending on whether his message or other lines of business comport with a conception of "diversity" that reflected the state of competition and technology in the media marketplace nearly a quarter of a century ago.

20. The same facts, summarized above, that support the conclusion that diversity of viewpoints has been achieved also support the conclusion that the newspaper-television cross-ownership rule is unnecessary to protect economic competition. The antitrust laws exist to promote consumer welfare.[8] The government promotes consumer welfare in media markets when it prevents monopoly in the marketplace for advertising *or* the marketplace of ideas. As anyone experienced in antitrust law and economics is well aware, no basis exists to believe that the federal courts, interpreting the Sherman and Clayton Acts in cases brought by either public or private antitrust enforcers, lack the opportunity and ability to prevent either form of monopoly. By repealing the newspaper-television cross-ownership rule, the FCC would not be repealing "diversity of viewpoints," "diversity of expression," "diversity of ownership," and similar articulations of the purpose of the newspaper-television cross-ownership rule; rather, the Commission would be establishing that those objectives are properly made coextensive with the antitrust laws' goal of maximizing consumer welfare.

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7. 436 U.S. 775 (1978) (*NCCB*).

8. *E.g.*, National Collegiate Athletic Ass'n. *v.* Board of Regents of Univ. of Okla., 468 U.S. 85, 107 (1984); Reiter *v.* Sonotone Corp., 442 U.S. 330, 343 (1979) (citing ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (Free Press 1978)); *see also* Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CALIF. L. REV. 1005 (1987).

21. Indeed, if one used the consumer-welfare model from antitrust law as a guide, the newspaper-television cross-ownership rule, which bars market entry and the efficient exploitation of economies of scope, would be condemned as an unreasonable restraint of trade if produced by the private agreement of competitors rather than by government fiat. Judge Richard A. Posner reflected on such an anomaly in his 1992 decision for the Seventh Circuit in *Schurz Communications, Inc.* v. *FCC*,[9] invalidating the FCC's financial interest and syndication rules:

> If the Commission were enforcing the antitrust laws, it would not be allowed to trade off a reduction in competition against an increase in an intangible known as "diversity." Since it is enforcing the nebulous public interest standard instead, it is permitted, and maybe even required, to make such a tradeoff—at least we do not understand any of the parties to question the Commission's authority to do so. And although as an original matter one might doubt that the First Amendment authorized the government to regulate so important a part of the marketplace in ideas and opinions as television broadcasting, the Supreme Court has consistently taken a different view.[10]

In the case of the newspaper-television cross-ownership rule today, there is no gain in diversity to be achieved by continuing to restrict competition. Twenty-three years after adoption of the rule, the market is diverse *and* competitive. In contrast, the continued enforcement of the rule, which blocks competition in the pursuit of diversity, will *not* make a diverse market more diverse; rather, such enforcement will entail an additional sacrifice in the form of diminished freedom of speech and freedom of the press. Put differently, when confronted by the FCC's enforcement of an anticompetitive regulation like the newspaper-television cross-ownership rule, it *is* appropriate, to use Judge Posner's words, for "the parties to question the Commission's

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9. 982 F.2d 1043 (7th Cir. 1992) (vacating the "finsyn" rules of 47 C.F.R. § 73.658(j) as arbitrary and capricious and remanding to the FCC).

10. *Schurz*, 982 F.2d at 1049 (citing FCC *v.* National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978); FCC *v.* Pacifica Found., 438 U.S. 726 (1978); NBC *v.* United States, 319 U.S. 190, 226-27 (1943)).

authority to do so." Surely the First Amendment or the public-interest standard of the Communications Act does not command the government today to pursue "diversity" in the specific form of the newspaper-television cross-ownership rule, especially once the goals of the rule have, as an indisputable factual matter, been fully achieved. As noted earlier, the pursuit of diversity is not free in terms of its cost of reducing other social goals. When the media market is already diverse, it is an unproductive bargain for the Commission to trade away a large measure of competitive entry and a large measure of freedom of the press for a small, probably nonexistent, measure of diversity. If the FCC were today to construe the Communications Act to permit (or even to require) an interpretation of "diversity of viewpoints" that coincided with the consumer welfare standard of antitrust law, the federal courts surely would respect that exercise of agency discretion.[11]

22. Indeed, without considering the harm to the public interest from the rule's diminution in competition, one can express the tradeoff between diversity and free speech more emphatically as a prudential canon of *constitutional* law. If there are two ways for the FCC to interpret "diversity of viewpoints," and one interpretation could reduce the freedom of speech or the freedom of the press, the Commission plainly should choose the second interpretation. That advice is consistent with the familiar prudential rule, commonly attributed to Justice Louis Brandeis's 1936 concurrence in *Ashwander* v. *Tennessee Valley Authority*,[12] that a court (and a fortiori a regulatory agency) should read a statute in a manner that avoids having to decide a constitutional question. Of course, in this case there is not even a federal *statute* to construe. The

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11. *Cf.* Chevron U.S.A. Inc. *v.* Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

12. 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (citing Liverpool, N.Y. & Philadelphia S.S. Co. *v.* Commissioners of Emigration, 113 U.S. 22, 39 (1885)).

newspaper-television cross-ownership rule was made by the FCC without statutory imperative and can be discarded by the same agency—not to mention by a reviewing court.

II. The Spectrum "Scarcity" Rationale

23. Spectrum scarcity has been a premise of nearly all federal regulation of broadcasting. In 1990 the Supreme Court stated in *Metro Broadcasting, Inc.* v. *FCC*[13] that "[s]afeguarding the public's right to receive a diversity of views and information over the airwaves," is, given the state of the Court's understanding of spectrum scarcity in 1990, "an integral component of the FCC's mission."[14] Without any consideration of how the technology of telecommunications might have advanced since 1969 in such a way as to make the scarcity rationale obsolete, the Court quoted its opinion issued that year in *Red Lion Broadcasting Co.* v. *FCC*: "Because of the scarcity of electromagnetic frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."[15]

24. Yet, to the extent that any such scarcity exists, it is the product of the federal government's own intervention in the marketplace for radio communications. On multiple grounds, *spectrum scarcity is endogenously determined by the regulator*. It is therefore circular to say that spectrum justifies any particular form of broadcast regulation. To the contrary, spectrum scarcity *results from* broadcast regulation. The inherent endogeneity of spectrum

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13. 497 U.S. 547, 579–601 (1990). *See* Neal Devins, Metro Broadcasting, Inc. *v.* FCC: *Requiem for a Heavyweight*, 69 Tex. L. Rev. 125 (1990).

14. *Metro Broadcasting*, 497 U.S. at 567.

15. *Id.* at 566–67 (quoting Red Lion Broadcasting Co. *v.* FCC, 395 U.S. 367, 390 (1969)). Justice Byron White, author of *Red Lion*, was evidently the swing vote in *Metro Broadcasting*, a 5–4 decision. *See* Devins, *supra* note 13, at 125 n.6.

scarcity with respect to FCC regulation is the central point to comprehend about the fallacy of the Commission's reliance on spectrum scarcity as a justification for the newspaper-television cross-ownership rule. After one comprehends this critical relationship of political economy, the logical and factual fallacy of the five most common variations on the spectrum scarcity argument is readily apparent.

A. *The Inherent Endogeneity of Spectrum Scarcity with Respect to FCC Broadcast Regulation*

25. The ostensible purpose of the first significant radio regulation in the United States was to minimize interference between rival radio broadcasters in the early 1920s who lacked a system of enforceable property rights in the electromagnetic spectrum. But as Judge Stephen F. Williams recently observed, "Alleviation of interference does not necessitate government content management; it requires, as do most problems of efficient use of resources, a system for allocation and protection of exclusive property rights."[16] Such a system began to evolve when, in November 1926, an Illinois court recognized in *Tribune Co.* v. *Oak Leaves Broadcasting Station* a broadcaster's common law property right to eject trespassers, by force of injunction, from the frequency on which it operated.[17] Congress, however, chose not to permit private ownership of the spectrum to develop in that manner and instead enacted legislation in 1927 preempting state law and licensing the spectrum's use.[18] According to research by Professor Thomas Hazlett, Congress understood in 1927 that a system of private property rights in the

16. *See* Time Warner Entertainment Co. *v.* FCC, 105 F.3d 723, 725 (D.C. Cir. 1997) (Williams, J., dissenting from the denial of rehearing *en banc*).

17. Cir. Ct., Cook County, Ill., Nov. 17, 1926. *Oak Leaves* appears to be publicly available today only in the *Congressional Record*, where it was inserted in its entirety several weeks after being handed down. *See* 68 CONG. REC. 216, 219 (1926).

18. Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927), *repealed by* Communications Act of 1934, ch. 652, 602(a), 48 Stat. 1102 (current version at 47 U.S.C. 151-613 (1988)).

broadcast spectrum would have been feasible.[19] Congress, however, chose to allocate spectrum through a regulatory process rather than through markets, and the Federal Radio Commission then reduced the supply of frequencies available for radio broadcasting below the level then technically feasible.[20]

26. The Federal Radio Commission erected a zoning system for the spectrum, which continued under the Federal Communications Commission's supervision, beginning in 1934. By the early 1940s, however, the federal government's principal justification for regulating broadcasting had shifted away from preventing interference. The FCC and the Supreme Court, led by Justice Felix Frankfurter, maintained that the spectrum was finite and that the agency had to regulate the structure of the communications industry to prevent a monopoly in the marketplace of ideas. The transformation began with Justice Frankfurter's 1940 opinion in *FCC* v. *Pottsville Broadcasting Co.*[21] and was complete with his 1943 opinion in *National Broadcasting Co.* v. *United States*.[22]

27. On engineering grounds, the spectrum-scarcity premise of *Pottsville*, *NBC*, and their progeny is untenable. To the extent that it exists, the scarcity resulting from the finite supply of spectrum at any given moment is a problem that diminishes over time. The dynamic, as opposed to static, supply of usable spectrum depends on the state of communications technology, including the precision (and hence the cost) of transmitters and receivers. At any point in time, we could have more "diversity" if we were willing to pay the higher price to

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19. *See* Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 158–63 (1990) [hereinafter *Rationality of Broadcast Regulation*].

20. *Id.* at 152–58.

21. 309 U.S. 134, 137 (1940).

22. 319 U.S. 190, 215–17 (1943) *(NBC)*; *see also* Associated Press *v.* United States, 326 U.S. 1, 20 (1945) (Black, J.); FCC *v.* Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940) (Roberts, J.).

produce television receivers with more demanding specifications, or if we were willing to degrade the quality of radio transmissions somewhat by assigning more broadcast licenses in a given region. As Judge Patricia Wald has noted, "[t]echnical assumptions about the uniqueness of broadcast . . . have changed significantly in recent years."[23]

28. Spectrum becomes less scarce whenever new technologies permit transmissions to be packed more densely into a given bandwidth or to be transmitted by radio at higher frequencies that are generally considered to be less desirable. One spread-spectrum technology known as "software radio" may one day offer virtually limitless spectrum capacity by enabling radio transmissions to shift continuously to unused frequencies across the entire spectrum.[24] Digital-compression technology already in existence permits a multitude of motion pictures to be transmitted simultaneously in the bandwidth currently used by a single over-the-air NTSC television signal.

29. For a moment, however, assume counterfactually that not a single engineering breakthrough had been achieved in the spectral efficiency of radio transmission since 1934. The scarcity thesis still would be legally untenable because it relies on specious *economic* reasoning. All valuable goods are scarce. That is why the price of a product is almost always a positive number. Newsprint has a positive price because it too is scarce, but that characteristic in no way justifies regulating who may own a newspaper or what he may say in it, even if the newsprint is made from the pulp of trees harvested from federal forest land.

30. There is nothing new about that reasoning. Nobel laureate Ronald Coase had this

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23. Action for Children's Television *v.* FCC, 58 F.3d 654, 684 (1995) (Wald, J., dissenting).

24. Raymond J. Lackey & Donald W. Upmal, *Speakeasy: The Military Software Radio*, IEEE COMMUNICATIONS MAG., May 1995, at 56.

insight in a famous article in 1959.[25] Judge Robert Bork articulated it succinctly in his decision for the D.C. Circuit in *Telecommunications Research and Action Center* v. *FCC* in 1986.[26] Similarly, Chief Judge Harry Edwards of the D.C. Circuit dismissed spectrum scarcity in 1995 as an "indefensible notion."[27] And scholars in law, economics, and engineering before and since have explained the fallacy of spectrum "scarcity" in exhausting detail.[28]

31. Moreover, the putative scarcity of spectrum has resulted from the federal government's own non-market method of allocation: It hardly justifies regulating the structure of the telecommunications industry that we observe excess demand for valuable spectrum when

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25. Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959).

26. 801 F.2d 501, 508 (D.C. Cir.) (*TRAC*), *reh'g en banc denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

27. *Action for Children's Television*, 58 F.3d at 675 (Edwards, C.J., dissenting).

28. *See, e.g.*, LILLIAN R. BEVIER, IS FREE TV FOR FEDERAL CANDIDATES CONSTITUTIONAL? 25-28 (AEI Press 1998); J. GREGORY SIDAK, FOREIGN INVESTMENT IN AMERICAN TELECOMMUNICATIONS 301-04 (University of Chicago Press 1997); THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 204-18 (MIT Press & AEI Press 1994); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 672-74 (Little, Brown & Co., 4th ed. 1992); ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 188-90 (Scott, Foresman & Co. 1988); LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 199-209 (University of California Press 1987); MATTHEW L. SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES (Yale University Press 1986); DOUGLAS H. GINSBURG, REGULATION OF BROADCASTING 58-61 (West Publishing Co. 1979); BRUCE M. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT (Ballinger Publishing Co. 1975); HARVEY J. LEVIN, THE INVISIBLE RESOURCE: USE AND REGULATION OF THE RADIO SPECTRUM 111-12 (Johns Hopkins University Press 1971); Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905 (1997); J. Gregory Sidak, *Telecommunications in Jericho*, 81 CALIF. L. REV. 1209 (1993); Hazlett, *Rationality of Broadcast Regulation, supra* note 19, at 137; Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990 (1989); Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U. L. REV. 401 (1989); William T. Mayton, *The Illegitimacy of the Public Interest Standard at the FCC*, 38 EMORY L.J. 715, 718-19 (1989); Matthew L. Spitzer, *Controlling the Content of Print and Broadcast*, 58 S. CAL. L. REV. 1349, 1358-64 (1985); Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221-26 (1982); Daniel D. Polsby, *Candidate Access to the Air: The Uncertain Future of Broadcaster Discretion*, 1981 SUP. CT. REV. 223, 255-62; Jora R. Minasian, *Property Rights in Radiation: An Alternative Approach to Radio Frequency Allocation*, 18 J.L. & ECON. 221 (1975); Arthur S. De Vany, Ross D. Eckert, Charles J. Meyers, Donald J. O'Hara & Richard C. Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 STAN. L. REV. 1499 (1969); Abbott B. Lipsky, Jr., Note, *Reconciling* Red Lion *and* Tornillo: *A Consistent Theory of Media Regulation*, 28 STAN. L. REV. 563, 575-79 (1976); Leo Herzel, Comment, *"Public Interest" and the Market in Color Television Regulation*, 18 U. CHI. L. REV. 802 (1951).

the FCC gives it away for free.[29] We would witness the same excess demand today if the federal government conveyed the Presidio in San Francisco to homesteaders, or, more to the point, if newsprint could be acquired only from the government, and the government gave it away for free. Professor Lillian BeVier has described this phenomenon in the following words:

> [One] possible denotation of spectrum "scarcity" is that there are fewer frequencies than there are people who want them. That too is an accurate but incomplete statement. The distinction it implicitly draws between publishers and broadcasters, for example, is the product of a government-inflicted wound rather than an artifact of any natural, unique attribute of the spectrum. The reason excess demand for publishing rights does not exist is that the price that emerges in the market for newspapers "brings supply and demand into equilibrium." The regulatory scheme that the government has adopted for the spectrum does not work in that way. Instead, the government imposes barriers to entry and removes them only for its licensees, to whom it grants the rights for free. After that, the licensee can sell the license at whatever price the market will bear; meanwhile, the licensee will be entitled to all the revenues. When the supply of a revenue-producing asset is artificially limited, and then the asset is given away at a price of zero, there is bound to be "excess demand." But that kind of scarcity is unique to broadcasting only because, with respect to broadcasting but not with respect to print, the government has asserted ownership of an essential factor of production, proceeded to give it away rather than sell it, and prohibited intruders from encroaching.[30]

Judge Williams describes this rendition of the spectrum scarcity fallacy as "the idea that an excess of demand over supply at a price of zero justifies a unique First Amendment regime."[31] That is the constitutional fallacy of the inherent endogeneity of spectrum scarcity with respect to the FCC's administration of the broadcasting licensing provisions of the Communications Act. It bears emphasis that it has been the agency's administration of the act, *and not Congress' enactment of the Communications Act itself,* that has produced "an excess of demand over supply

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29. Professor Hazlett estimates that, in 1985 dollars, the capitalized value of the forgone economic rents from the FCC's grant of licenses for 492 VHF and 177 UHF television stations as of 1975 was $ 17.2 billion. Hazlett, *Rationality of Broadcast Regulation, supra* note 19, at 135 tbl. 1.

30. BEVIER, *supra* note 28, at 26-27 (citations omitted).

31. *Time Warner Entertainment*, 105 F.3d at 724 (Williams, J., dissenting from denial of rehearing *en banc*).

at a price of zero." A legislated regime of public ownership and government licensure of private use does not inherently imply artificial scarcity. The FCC's failure to allocate spectrum at its market-clearing price is an act whose entirely predictable effect, if not its express purpose, is to provide the ostensible justification for pervasive and enduring regulation. The entry barrier imposed by the newspaper-television cross-ownership rule is but one regulation resulting from the FCC's own convolution of forces that would otherwise efficiently allocate licenses to use a public resource.

B. *The Five Fallacious Scarcity Rationales*

32. One can envision five different versions of "scarcity."[32] The first form is "static technological scarcity," which refers to the problem of interference when multiple broadcasters transmit on the same frequency. The argument from static technological scarcity is that regulation prevents overlapping transmissions and thus prevents chaos on the air.[33] But, as *Oak Leaves* demonstrated in 1926 and as Judge Williams noted in 1997, such conflicting uses only necessitate the creation and enforcement of a system of property rights. Regulation of the structure of the broadcasting industry, let alone its content, does not logically follow from "static technological scarcity."

33. The second form of scarcity, "dynamic technological scarcity," is the notion that the broadcast spectrum will eventually be exhausted because it is inherently finite—one cannot produce more spectrum. That form of scarcity also fails because the resources required to

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32. The scarcity nomenclature used in this section is derived from THOMAS W. HAZLETT & MATTHEW L. SPITZER, PUBLIC POLICY TOWARD CABLE TELEVISION: REGULATION AND THE FIRST AMENDMENT ch. 4 (AEI Working Paper in Telecommunications Deregulation 1996).

33. *NBC*, 319 U.S. at 212; *Red Lion*, 395 U.S. at 375–78.

manufacture transmitters and receivers that are more spectrally efficient are no more limited than are the resources used to produce paper. As Chief Judge Edwards observed in 1995, "today . . . the nation enjoys a proliferation of broadcast stations, and should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum."[34]

34. "Excess demand scarcity" is a third scarcity concept connoting that more people wish to have spectrum rights than there are possible rights to distribute.[35] This scarcity argument is tautological and most directly embodies the endogeneity problem discussed earlier. To reiterate, there would be no excess demand for spectrum if the FCC allocated spectrum at market-clearing prices.

35. The fourth form of scarcity, "entry scarcity," refers to the argument that broadcasting should be licensed because entry into broadcasting is more difficult than entry into the print media.[36] That argument is circular: The primary obstacles to entry in broadcasting are the burdensome regulations and restrictions on entry themselves. Moreover, it is doubtful as a factual matter that the capital requirements to enter broadcasting exceed those necessary to compete in the daily newspaper business against a large print institution, such as the *New York Times*. Cable television systems are just as subject to this so-called "entry scarcity." Nonetheless, the federal courts have generally refused to accept scarcity as a justification for

34. *Action for Children's Television*, 58 F.3d at 675 (Edwards, C.J., dissenting).

35. *Red Lion*, 395 U.S. at 398-99. The FCC calls this "allocational scarcity." Syracuse Peace Council, 2 F.C.C. Rcd. at 5048-49 ¶¶ 37-39.

36. Berkshire Cablevision *v.* Burke, 571 F. Supp. 976, 987 n.10 (D.R.I. 1983), *aff'd*, 773 F.2d 382 (1st Cir. 1985).

limiting the speech of cable television operators.[37] So did the Supreme Court in its 1994 decision in *Turner Broadcasting System, Inc.* v. *FCC*,[38] in which the Court considered the constitutionality of the "must-carry" rules in the Cable Television Consumer Protection and Competition Act of 1992.[39] Those rules required cable systems to set aside a portion of their channels for retransmission of local broadcast programming. The Court rejected the government's argument that, because cable raised scarcity problems just as broadcasting did, the Court should review the must-carry rules under a lesser standard of scrutiny. The majority stated:

> The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast media. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and other broadcast cases is inapt when determining the First Amendment validity of cable regulation.[40]

The same reasoning by which the Court distinguished cable television from broadcasting also would distinguish current-day broadcasting from broadcasting as it is likely to be conducted in the near future. Digital compression will make all wireless services (including broadcasting) more spectrally efficient. Spread spectrum techniques, moreover, will make existing frequencies allocated to cellular telephony far more capacious and will greatly reduce the likelihood of physical interference. Thus, while purporting to distinguish *Red Lion* from *Turner*, the Court

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37. Preferred Communications, Inc. *v.* City of Los Angeles, 754 F.2d 1396, 1402–05 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 488 (1986); Omega Satellite Prods. Co. *v.* City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982); Home Box Office, Inc. *v.* FCC, 567 F.2d 9, 44–46 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

38. 114 S. Ct. 2445 (1994).

39. Pub. L. No. 102-385, 106 Stat. 1460 § 4 (1992) (codified at 47 U.S.C. §§ 534–35).

40. 114 S. Ct. at 2457.

was actually sowing the seeds of *Red Lion*'s demise. When *Red Lion* is inevitably overruled or distinguished away into oblivion, the Court will cite the preceding passage from *Turner* as support for its holding.

36. The last scarcity rationale, "relative scarcity," maintains that broadcast spectrum is substantially more scarce than paper. The argument, however, overlooks that one cannot quantify "units" of spectrum in comparison with units of paper without considering the ultimate purpose that those units will serve. Often, only one medium is suitable for a particular job: one cannot broadcast music through paper. That scarcity rationale attempts to compare the incomparable.

III. THE "PERVASIVENESS" RATIONALE

37. Another rationale offered for retaining the newspaper-television cross-ownership rule is the "pervasiveness" of the influence of broadcasting. The argument takes two forms. Neither is persuasive.

A. *Intrusion*

38. One rationale that the Supreme Court has offered for the second-class status of broadcasters under the First Amendment is the notion that broadcasting is an "intruder" that is "uniquely pervasive" and "uniquely accessible to children."[41] The intrusion rationale purports to justify draconian regulations such as the ban on "filthy words" in *FCC* v. *Pacifica Founda-*

41. FCC *v.* Pacifica Foundation, 438 U.S. 726, 748–49 (1978). For penetrating analyses of the intrusion rationale, upon which this discussion is based, see KRATTENMAKER & POWE, *supra* note 28, at 219–21; SPITZER, *supra* note 28, at 124–30.

tion.[42] It forces the conclusion that certain types of programming that some consumers desire may be barred from the air because some other consumers do not desire such programming. While the scarcity argument permits substitutions for what a broadcaster would prefer to air, the intrusion argument permits complete bans. Thus, intrusion supports direct censorship, while scarcity supports indirect censorship at worst.

39. Furthermore, is it even credible to portray the broadcast media as intruders? Radios and televisions, after all, are not forced on the public. We buy them willingly. Even if broadcast media could be equated with intruders, that association hardly would distinguish them from newspapers, magazines, or books. In each instance, the product is voluntarily brought into one's home yet may have scandalous contents. For example, many newspapers run photos and stories depicting risqué and bloody acts. Surely some newspaper readers find that content offensive. Yet such content obviously has not made those newspapers "intruders" subject to regulation. In any event, if one wants to control the pervasiveness of unpleasant broadcast content, more narrowly crafted tools, such as obscenity statutes, either already exist or readily suggest themselves. It would be a *non sequitur* to say that a newspaper and a television station in a particular city may not merge because television has a pervasive effect on society.

B. *Power*

40. First Amendment scholars Thomas Krattenmaker and Lucas Powe suggest that *Pacifica* may imply a more fundamental justification for regulating broadcast speech: Broadcasting is too powerful a force to be left unregulated.[43] But what kind of power does broadcasting,

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42. 438 U.S. 726 (1978)
43. KRATTENMAKER & POWE, *supra* note 28, at 221-24.

and particularly television, actually possess? The basis of the power hypothesis today is the extraordinary amount of television that Americans watch, and its supposed credibility in the eyes of the public. Yet such logic suggests that before the heyday of broadcast media, when most people read and trusted newspapers as their vital source of information, newspapers should have been entitled to lesser First Amendment status as well. The existence of Supreme Court decisions such as *Near* v. *Minnesota*[44] in 1931 and *Grosjean*[45] in 1936 refutes such reasoning.

41. There are reasons to reject general regulation of broadcast media based on its supposed power. First, the notion of power does not distinguish between those outlets with power and those without it. Thus, the theory fails to explain why the smallest local television station is more powerful than, say, the *New York Times* or the *Washington Post*. Second, the power rationale seems rooted in the fear that those with power will abuse it, and it ignores that regulators can commit abuses in pursuit of illusory malefaction by broadcasters. Third, the theory is a sad commentary on our nation in that it suggests a populace of mindless automatons manipulated from afar by faceless executives who direct broadcast programming.[46] In short, the power hypothesis may explain why broadcast regulations exist, but it fails to justify them and to provide the constitutional rationale for the different protections of speech afforded print and broadcasting. It surely cannot justify retaining the newspaper-television cross-ownership rule.

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44. 283 U.S. 697, 706, 722-23 (1931).

45. Grosjean *v.* American Press Co., 297 U.S. 233 (1936).

46. *See* Louis Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 787 (1972).